IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1624

ILLINOIS BROADCASTING COMPANY, INC.,

and

LINDSAY-SCHAUB NEWSPAPERS, INC.,

Petitioners,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The petitioners[1] respectfully seek a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in this case on March 1, 1977.[2]

[1]Petitioner Illinois Broadcasting Company owns, and operates under a license from the FCC, radio stations WSOY and WSOY-FM, at Decatur, Illinois. Various stockholders of the broadcast company own directly and indirectly the stock of Petitioner Lindsay-Schaub Newspapers, Inc., publisher of a daily newspaper at Decatur, the *Herald and Review*.

[2]The judgment and opinion of the Court of Appeals was entered in ten consolidated cases challenging, in various aspects, [footnote continued]

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported; however, it is printed in the appendix to the petition for a writ of certiorari filed in this Court by the Federal Communications Commission on April 22, 1977.[3] The FCC Appendix in No. 76-1471 will be referred to herein as "FCC App".

JURISDICTION

The judgment of the Court of Appeals which was entered on March 1, 1977, appears at FCC App. 159-160. The order of the Court of Appeals on the FCC's motion for stay of mandate, filed April 5, 1977, is found at 163-167 of the FCC Appendix. The jurisdiction of this Court is invoked under 28 U.S.C. §§1254(1), 2350 and Rule 19(b) of the Rules of this Court.

QUESTIONS PRESENTED

The questions presented by the decision of the Court of Appeals are:

1. Whether the First Amendment to the Constitution and the Communications Act, singly or in concert, require that a long-established, existing radio station in a

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orders of the Federal Communications Commission which, taken together, limit broadcast-newspaper ownership in the same community. The consolidated cases were styled *National Citizens Community for Broadcasting v. F.C.C. and USA, et al.*, Case Nos. 75-1064, 75-1152, 75-1289, 75-1579, 75-1386, 75-1387, 75-1388, 75-1567, 75-1614 and 75-1618.

[3]The Federal Communications Commission filed its petition for writ of certiorari, No. 76-1471, on April 22, 1977. In a separately printed appendix, the Commission set out the opinion of the Court of Appeals, that court's order staying its mandate, in part, and the relevant orders of the Commission in the rule making proceeding (FCC App. 61-158) which were the subject of the several petitions for review consolidated below.

city in which there are other broadcast stations, separately owned, must divest itself of ownership interests in the daily newspaper in that city where (a) the Federal Communications Commission did not require such divestiture but the court directed the agency to reach that result, and (b) the court's direction to the agency to adopt rules for divestiture in newspaper-radio situations was a marginal adjunct to its consideration of newspaper-television situations.

2. Whether this Court's views in *U.S. v. RCA*, 358 U.S. 334 and *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, concerning, respectively the significance of media monopoly and a diversity of viewpoints were improperly extended by the Court of Appeals to the proposition that even in a multi-media outlet city, the diversity of ownership of communication media transcends every other consideration under the "public interest" standard of the Communications Act so as to require the FCC to order the break-up of every situation of newspaper-broadcast cross-ownership in the same city (with even limited waiver possibilities to exclude consideration of disruption of service from the station or economic injury to the station or newspaper).

3. Whether the Court exceeded its proper role of review under Section 402(a) of the Communications Act by substituting its judgment for that of the Commission in an agency rule making proceeding and directing the Commission to adopt a broadcast licensing policy to break up all situations of common ownership of broadcast stations and daily newspapers in the same community.

STATUTES INVOLVED

Sections 303(g), 309(a), 309(d)(1) and 402(2) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§303(g), 309(a) and 309(d), are set forth in FCC App. 168-170. Sections 307(a) and 307(d) of that Act, 47 U.S.C. §§307(a) and 307(d), are set forth in the Appendix to the Petition for Writ of Certiorari filed by Channel Two Television Company *et al.*, in No. 76-1521, filed May 3, 1976. References to that appendix will be "Channel Two App.". Section 402(a) of the Communications Act, 47 U.S.C. 402(a) and relevant portions of the Administrative Procedure Act, as amended (5 U.S.C. §706), of the Judicial Review Act, as amended, 28 U.S.C. §§2341 *et seq.*, are set forth in the Appendix to this Petition. Rule 19(b) of this Court is also printed in the Appendix.

STATEMENT

The issues in this case arise from the decision of a three judge panel of the U.S. Court of Appeals for the District of Columbia Circuit to impose upon the Federal Communications Commission a judicially established presumption that all situations of co-ownership of a broadcast station and a newspaper in the same city are contrary to the public interest and must accordingly be broken up. The Commission had ordered only limited divestiture of co-located newspaper-broadcast combinations, where, in the agency's view, there was effective local media monopoly, (the same party owned or controlled the community's only newspaper and the only television station or, if there was no local TV station, the only radio station). The court, however, took that Commission media diversification policy and directed

that it be enlarged and applied to all same-city broadcast and newspaper co-ownerships.[4]

The opinion and judgment of the Court of Appeals was entered in a Sec. 402(a) review case[5] which eventuated from the Federal Communications Commission's rule making proceeding, initiated in 1970, to consider whether the common ownership of a newspaper and broadcast station(s) in the same city, long encourged by the Commission to induce newspaper owners to take the risks involved in ploughing the new ground of first, radio, and later television, should be continued to be sanctioned.

The Commission's broadcast-newspaper ownership review followed a proceeding in which it had updated its rules and policies concerning ownership of different types of broadcast stations (TV, AM, FM) by the same owner in the same city. Those rules did not require divestiture of existing facilities, but applied only to applications for new facilities or in the case of sale/purchase of existing stations.[6]

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[4]With the possibility, perhaps, of a waiver in a given situation, but without the newspaper/broadcast station's financial or personal interests cognizable as a waiver factor, however.

[5]Sec. 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. §402(a) and 28 U.S.C. §§2341, 2342, 2349 (80 Stat. 621).

[6]See synopsis of the 1968-1970 stage in Paragraphs 2-3 in the FCC's Multiple Ownership Second Report and Order, 50 FCC 2d 1046 (1975), printed in FCC App. at 61-147, reconsideration denied, 53 FCC 2d 589 (1975), printed in FCC App. 148-158.

With that, the Commission then turned to a consideration of common ownership of a daily newspaper and a broadcast station in the same market.[7] The rule making proceeding spanned a five-year period, and numerous documentary pleadings, evidentiary matter and a three-day oral argument before the Commission *en banc* provided a voluminous record for the Commission's final determination on the question of whether newspaper-broadcast common ownership should be banned. The Commission concluded that there were different circumstances applicable to newspaper owners applying for new broadcast facilities than present in existing situations of previously authorized and established newspaper-owned AM, FM or TV stations. The Commission found no record evidence warranting an across-the-board divestiture of existing newspaper-AM, FM or TV combinations, except in what was termed the "egregious" situation of the absence of another broadcast station in the newspaper-broadcast city. The establishment of new co-located newspaper-broadcast combinations was proscribed. The existing combinations (except in the "egregious" cases) were, accordingly, "grandfathered". Report and Order, FCC 2d 1046 (1975), reconsideration denied 53 FCC 2d 589 (1975) (FCC App. 61-147, 148-158).

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[7]Further Notice of Proposed Rule Making, Multiple Ownership of Standard FM and TV broadcast stations, 22 FCC 2d 339 (1970), summarized in Paragraph 4 and 5 in the Second Report and Order, *supra* (FCC App. 62).

Appellate review of the Commission's new newspaper-broadcast rules was sought by a number of parties, pursuant to Section 402(a) of the Communications Act (47 U.S.C. §402(a)).[8] Those seeking review[9] of the FCC Order were, broadly, in three groups. In the first group were those who were subject of divestiture in the limited, "egregious" market situations. Then came various broadcast/newspaper owners, the newspaper publishers' association (ANPA) and the radio-television trade association (NAB), who addressed both the limited divestiture requirement and the prospective ban anent new combinations. Finally, there was a group lead by the self-styled National Citizens Committee for Broadcasting, which challenged the FCC's order as insufficient in not requiring across-the-board divestiture, but focusing on TV-newspaper combinations, however. The U.S. Department of Justice argued that the FCC should have provided for across-the-board divestiture in the TV-newspaper combination situations.[10]

Notwithstanding the absence of a direct challenge to the Commission's "grandfathering" of radio-newspaper co-ownership situations,[11] the Court of Appeals invali-

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[8]See footnote 2, *supra*.

[9]And intervenors on such petitioners' side.

[10]The Department of Justice initially appeared below as a statutory respondent under 28 U.S.C. 2348; however, it also filed its own Petition for Review challenging the FCC order, in Case No. 75-1327. Later the Department's brief was entitled, "Brief for Respondent United States of America", and it urged the court below to affirm those portions of the FCC newspaper/broadcast rules which prohibited the creation of new common ownership situations but asked that the portions of the rules with respect to existing cross-interest situations (with the focus on TV) be vacated and remanded for further agency consideration. Brief, pages 1-3, App. B.

[11]The Justice Department's Statement of the Issue, in its Brief in the consolidated cases below, was whether the FCC "properly

dated even that part of the Commission's new newspaper/broadcast rules by a marginal note to that effect.[12] The court directed that the agency should be bound by "a presumption against cross-ownership" and on remand for further proceedings not inconsistent with the court's opinion, must (thus) adopt a "policy of giving diversity of media ownership controlling weight". (Opinion below, printed at FCC App. 56-57, 167). The court affirmed the FCC's new rules barring the establishment of new newspaper cross ownership situations (AM, FM and/or TV). Then, the divestiture situations ordered by the Commission were set aside for the remand proceedings directed by the court, for similarity of treatment "under the standard already adopted for new license applications", the court demanding in that respect "consistent" treatment under the dissimilar circumstances of long established, previously approved newspaper co-ownerships and applications for new facilities where broadcast and newspaper ownerships would conjoin.

The Court held that the Commission erred because having attempted to promote diversity through the prospective rules, *i.e.*, a ban against the creation of new newspaper/broadcast co-ownership situations in the same market, it should have applied the same philosophy

weighed the values of diversity in viewpoint and economic competition in adopting a rule which substantially immunizes *television stations* from separation from commonly owned, co-located newspapers . . ." (Emphasis supplied). And see, *e.g.*, Justice Department's Brief (below) pages 18, 19, 21, 23 and 26. App. B. The within petitioners submit that the court ordered divestiture is no less erroneous as applied to newspaper/TV; however the petitioners' immediate interest is in the newspaper/radio aspect.

[12]"1 In addition to the newspaper-television regulations, 47 C.F.R. §73.636(c), which form the heart of this case, the Commission also promulgated similar regulations regarding newspaper-radio station combinations. * * * Our discussion, therefore, will pertain equally to both sets of regulations."

against existing co-ownership and required across-the-board divestiture, on a presumption, found by the court, that "cross-owned stations do not serve the public interest" (FCC App. at page 51). Although the Court remanded the cross media rule making proceeding and the FCC's Order therein to the agency, it directed the conclusion which the agency should reach, by saying that the presumption that cross media ownership cannot serve the public interest was "compelled" and not a discretionary conclusion to be reached by the Commission following further procedure (FCC App. 60).

REASONS FOR GRANTING THE WRIT

The decision of the three judge panel of the Court of Appeals, in an opinion filed by Chief Judge Bazelon, directed the Federal Communications Commission to apply the agency's newly adopted rules agianst the establishment of future situations of common ownership of a daily newspaper and a broadcast station in a retroactive manner to require divestiture of previously approved newspaper/broadcast operations would, if upheld, affect petitioners adversely. The court's direction to the Commission to reach court-directed results, notwithstanding the court found the record "essentially inconclusive" as to harmful effects on the public interest on account of co-ownership of a daily newspaper and a broadcast station, would affect substantially the public served by petitioners' radio stations and newspaper. Notwithstanding the fact that the radio-newspaper co-ownership situation had not been the focus of any petitioner's argument in the court (including the anti-trust division of the Department of Justice), [13] the court nonetheless directed the Commission to adopt a rule forcing divestiture by radio stations of newspaper interest in the city of license. The court substituted judicial philosophy for

[13] See footnotes 10 and 11, *supra*.

agency judgment in construing the public interest standard of the Communications Act, entrusted by Congress to the Commission. If the court's direction to the Commission that the agency must utilize the presumption against cross-ownership under the public interest standard of the Communications Act stands, the three judge panel will have effectively legislated an amendment to the Communications Act, intruding thereby on the field reserved to Congress. The court strode outside the proper boundaries of judicial review of an agency rule making action, as drawn by this Court in *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). and *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

Except in those markets where the newspaper/broadcast owner had no effective competition from separately owned media outlets, the FCC found no compelling reason to require across-the-board divestiture, taking into account, *inter alia*, disrupture of existing service and detriment to the newspaper/broadcast entity. As signaled above, footnote 10, *supra*, the Department of Justice argued that the Commission should have required divestiture in newspaper-television situations. The other party to the consolidated case below which urged reversal of the Commission's new rules on the grounds that they did not go far enough, National Citizens Committee for Broadcasting,[14] pointed up its (NCCB's) case in terms of "newspaper-television divestiture."[15] The Court of Appeals, however, was so insistent that the FCC adopt the court's philosophy of the "requirement" for diversity under the Communications Act and the First Amendment to the Constitution, that it went wider than the record made by the agency in the rule making proceeding

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[14]Petitioner in Case No. 75-1064, below.

[15]Petitioner NCCB's brief in Case Nos. 75-1064 below, pp. 2-3, 21, 22, 37, and that brief's Appendix A (App. B).

and beyond the significant arguments presented to the court. It directed the break up of co-owned co-located radio stations and newspapers, even in multi-media outlet cities. We submit that this exceeded the court's authority in reviewing the administrative agency's actions.

The lower court's direction to the Commission to include broad scale divestiture of co-owned newspapers and radio stations is in the form of a marginal embrace of radio stations with the television situations which had been briefed and argued to the Court.[16] Thus, a "footnote presumption", if you will, may destroy some 160 newspaper-radio combinations, without any real advance warning that the court was even considering such drastic measure. Newspaper/radio common ownership has been permitted under the Communications Act since its enactment in 1934. Nowhere has Congress suggested that radio station owners may not own a newspaper in their communities, nor that newspapers may not acquire or operate a radio station. Bars against newspaper owners are not found in the Communications Act.[17]

In its Report and Order, the Commission re-counted the positive advantages in the development of the broadcast industry and the utilization of broadcast facilities in the public interest, on the part of newspapers. As the Commission noted, it had actually encouraged newspaper ownership of broadcast facilities (see FCC

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[16] See footnote 12, *supra*.

[17] As a matter of fact, the record indicates that Congress is of the view that the Commission is without authority to bar newspapers from broadcast station ownership. For example, in connection with 1952 amendments to the Communications Act, a proposed amendment to prohibit the FCC from barring newspaper ownership was not included because "under the present law the Commission is not authorized to make or promulgate any rule or regulation the effect of which would be to discriminate against any person because such person has an interest in, or an association with, a newspaper . . . ." (Conference Report No. 2426, 82nd Cong., 2d Sess. (1952)).

App. 89-90). In the early years of AM radio, it was often the newspapers in the community which took the financial risk and built and operated a radio station. Then, when FM and TV began to develop, particularly during the post-World War II years, newspapers again provided a strong assist by constructing and operating stations in the new bands. The early years required substantial investment and little or no profit. The value of the newspaper role in development of the broadcast industry was not only in the willingness to invest money and carry loss operation, but the tremendous experience in communications which newspapers could and did bring. News gathering, editing and then the presentation of the material to the public, was readily translated by newspaper publishers into the programming format of broadcast.

The petitioners here represent a strong case in point. Petitioners with cross-ownership interests in the newspaper and radio stations WSOY and WSOY(FM), have operated the broadcast stations for more than three decades. The stations' records have been reviewed tri-annually by the Commission, when the licenses have been submitted for renewal. No showing of any mis-use of the cross ownership of the Decatur daily newspaper was ever developed in those proceedings. On the other hand, journalism experience of Lindsay-Schaub and its news gathering facilities brought an increase in that aspect of the broadcast stations' programming. And programming is the major premise of the whole Communications Act regulatory scheme. See, *e.g.*, *NBC v. U.S.*, 319 U.S. 190 (1943).

In *U.S. v. Radio Corporation of America*, 358 U.S. 334, 351-352 (1959), in a case concerning the FCC's utilization of the federal antitrust policy under the Communications Act "public interest, convenience or necessity" standard, this Court indicated that the situation in which the media concentration element

might prevail over the many other elements of the statute's standard was "when the publisher of the *sole newspaper* in an area *applies for* a license for the *only available radio and television* facilities, which if granted, would give him a monopoly of that area's major media of mass communications" (emphasis supplied). The Court of Appeals, however, would extend this to hold that the overriding consideration applies not only when the newspaper "applies for" a broadcast facility but after many years of meritorious operation so as to require divestiture; not merely when there would be a "monopoly of that area's major media of mass communications", but even where, as in the petitioners' case in Decatur, Illinois, there are a TV station and other AM and FM radio stations. And more, the Court of Appeals would require divestiture without considering either the public service, such as that provided by petitioner Illinois Broadcasting's WSOY and WSOY-FM, nor of economic harm or disadvantage to the petitioners and other broadcast-newspaper owners (FCC App. 52-58). All this, the petitioners submit, warrants review by this Court on writ of certiorari to the Court of Appeals.

The basic error in the opinion of the Court of Appeals is the proposition that diversity of ownership, even in a market of multi-media outlets, is required for its own sake under the Communications Act. The essence of the lower court's view of the Communications Act is that the Commission was created to administer the Act to see that newspapers don't have broadcast stations, or that broadcast stations owners aren't publishing newspapers in the communities of their licenses. The lower court missed the point that it is not ownership, but the service which the public gets as fairly reflecting the tastes and

viewpoints of the audiences in their service areas, which justifies FCC regulations.[18]

The Court of Appeals held that the *prospective* ban against a radio license to an applicant with a newspaper in the city in which the station would be located was a permissible licensing policy of the Commission, and would not be a prior restraint on the broadcast applicant or a bar against the newspaper's First Amendment expression rights. But then it extended that view to put away any First Amendment questions about forced divestiture of existing, long-approved newspaper-broadcast combinations. The purpose of the Communications Act and the FCC's authority thereunder in assigning scarce frequencies, with achievement of diversity of viewpoints a factor to be taken into account under the public interest standard of the Communications Act, justifies numerical limitation on the number of stations one individual could control, *U.S. v. Storer Broadcasting*, 351 U.S. 192 (1956). But the retroactive effect of requiring divestiture in previously approved situations of newspapers having radio licenses cannot be glossed on scarcity grounds. In *Storer, supra*, the FCC rules under consideration were numerical limitations on broadcast holdings, and nowise involved a bar, or even a limit, based upon a newspaper activity of an applicant. Similarly, the *Red Lion* case,[19] wherein this Court pointed to the importance of opportunities for the public to have

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[18] See, for example, *NAACP v. Federal Power Commission*, 425 U.S. 662, 670 (1976), where (n. 7) this Court referred to the FCC's regulations concerning employment discrimination by broadcasters, and noted their justification insofar as they are "necessary to enable the FCC to satisfy its obligation under the Communications Act . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups".

[19] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

diversity of viewpoints, related to the regulated broadcast medium and not to broadcast-newspaper ownership.

The Court of Appeals missed the First Amendment abridgement issue in its direction to the FCC to require a break-up of existing broadcast-newspaper combinations, by resolving (to the lower court's satisfaction) the First Amendment issue only in terms of the FCC's prospective ban against the establishment of new same-city combinations (FCC App. 29-33). Without more, it did not concede a constitutional issue in the divestiture aspect.

Whatever might be said about a licensing policy under the Communications Act which includes a factor of determining the effect *vel non* on the whole public interest quotient of an applicant's other media interests, it is quite another thing to say, as the Court of Appeals would do, that the FCC must interpret the Communications Act to require a radio station to dispose of a newspaper in its community of license, or lose its broadcast license. In another light, the requirement for divestiture would be laid upon the newspaper and it could continue its free speech right of publication only upon the condition of getting rid of its radio station. In either vein, the co-located newspaper/broadcast station owner's First Amendment rights would be infringed within the depth of such Constitutional protection outlined by this Court in *Miami Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

The most important element of any licensing policy of the FCC under the Communications Act, namely, the service which is rendered by a station, would be written out of consideration by the court. "With everybody on the air", wrote Mr. Justice Frankfurter for this Court thirty four years ago, "nobody could be heard". * * * [T]he radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interferring with one another. Regulation of

radio was therefore . . . vital to its development. . . ." *National Broadcasting Co. v. U.S.*, 319 U.S. 190, 212-213 (1943). And, with the interference and scarcity factors, this Court did not restrict the Commission to the role of a "traffic officer policing the wavelengths to prevent stations from interferring with each other" (319 U.S. at 315), but held that it was constitutionally permissible to allocate channels to " 'render the best practical service to the community reached' " (quoting from *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1949)). And see *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 394 (1969). But the Court of Appeals would apply those cases to require the suppression of newspaper ownership by a broadcast station owner in a market with many such otherwise-owned radio and TV stations (and often other newspapers, too).

Although the court below noted that "[t]he *Red Lion* Court carefully withheld approval from rules that would more directly interfere with the broadcaster's First Amendment rights . . ." (FCC App. 22-23), it misconstrued and misapplied this Court's decision in *Red Lion* to require divestiture, even in multi-media access communities and without regard to the service provided by the station[s]. This was contrary to this Court's statement in *NBC, supra*, that "[s]ince the very inception of federal regulation by [sic] radio, comparative considerations as to the service to be rendered have governed the application of the standards of 'public interest, convenience, or necessity' " (319 U.S. at 217).

The nub of the case which necessitates review and revision by this court, is the lower court's holding that the First Amendment objectives of preserving "an uninhibited marketplace of ideas in which truth will ultimately prevail . . .", *Red Lion Broadcasting Co. v. FCC, supra*, and the standard of "public interest,

convenience or necessity" of the Communications Act[19] require the FCC to accomplish across-the-board divestiture. Constitutional and statutory considerations aside, the Court of Appeals directs the agency to adopt the court's newly found presumption against any newspaper-broadcast cross-ownership in the same city. Rather than merely reversing the FCC and remanding the matter (see 5 U.S.C. §706(2)(A)), the opinion leaves the agency little doubt that it must adopt the court's "presumption" against any such cross interests, without any weighing of other public interest licensing factors, such as the all important one of service-to-the-public.[20] The lower court did not merely correct errors of law (assuming, *arguendo*, there were any); it commanded adoption of its own views, contrary to *U.S. v. Saskatchewan Minerals*, 385 U.S. 94 (1966) and *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17, 20 (1952) (Citing, *e.g.*, *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134).

The errors in the court's opinion present the same need for this Court's review as in *Pottsville, supra*, and *F.P.C. v. Idaho Power Co., supra*. Otherwise, the FCC will be required to disrupt newspaper/broadcast service to communities, without even a permissible consideration of the Communication Act's touchstone of program service.

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[19] §§303, 307(a), 309(a) of the Communications Act, 47 U.S.C. §§303, 307(a), 309(a). FCC App. 169-170; Channel Two App. 1a.

[20] "It should be emphasized that while the recommended amendment does eliminate the necessity for the type of involved and searching examination which the Commission must make in granting an original license, it does not in any way impair the Commission's right and duty to consider, in the case of a station which has been in operation and is applying for renewal, *the overall performance of that station against the broad standard of public interest, convenience, and necessity.*" Senate Report on Communications Act Amendments, 1952 (Senate Report No. 44, 82nd Cong., 1st Sess.) (Emphasis supplied).

CONCLUSION

We submit that the questions raised by this petition are of substantial importance, not only to the petitioners and the broadcast and newspaper publishing industries, but to the proper administration of the Communications Act of 1934 and administrative law, generally. The federal questions involve basic First Amendment rights and the inter-play between the Constitutional guarantee and the "public interest" standard of the Communications Act. It is submitted that the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Administrative Procedure Act of 1946, as amended:

5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall–

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be–

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

* * *

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. § 151 et seq.

§ 402. Proceedings to Enjoin, Set Aside, Annul, or Suspend Orders of the Commission.

(a) Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed by chapter 19A of Title 5 Law 901, Eighty-first Congress, approved December 29, 1950 [see 28 U.S.C. § 2341 *et seq.*]

Review of Orders of Federal Agencies, 28 U.S.C. 2341 *et seq.*

§ 2341. Definitions

As used in this chapter–

* * *

(3) "agency means–

(A) the Commission, when the order sought to be reviewed was entered by the Federal Communications Commission, the Federal Maritime Commission, the Interstate Commerce Commission, or the Atomic Energy Commission, as the case may be;

* * *

§ 2342. Jurisdiction of Court of Appeals

The Court of Appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of–

(1) all final orders of the Federal Communications Commission made reviewable by Section 402(a) of title 47;

* * *

§ 2344. Review of orders

* * * Any party aggrieved by the final order may, within sixty days after its entry, file a petition to review the order in the Court of Appeals wherein venue lies. The action shall be against the United States. * * *

§ 2348. Representation in proceeding; intervention

The Attorney General is responsible for and has control of the interests of the Government in all court proceedings under this chapter. The agency, and any parties in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right and be represented by counsel in any proceeding to review the order. * * *

§ 2349. Jurisdiction of the proceeding

(a) The Court of Appeals has jurisdiction of the proceeding on the filing and service of a petition to

review. The Court of Appeals in which the record on review is filed, on the filing, has jurisdiction to vacate stay orders or interlocutory injunctions previously granted by any court, and has exclusive jurisdiction to make and enter, on the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

* * *

§2350. Review in Supreme Court on certiorari or certification

(a) An order granting or denying an interlocutory injunction under Section 2349(b) of this title and a final judgment of the Court of Appeals in a proceeding to review under this chapter are subject to review by the Supreme Court on a writ of certiorari as provided by Section 1254(1) of this title. Application for the writ shall be made within 45 days after entry of the order and within 90 days after entry of the judgment, as the case may be. The United States, the agency, or an aggrieved party may file a petition for a writ of certiorari.

* * *

Rules of the Supreme Court of the United States

Rule 19. Considerations governing review on certiorari

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

* * *

(b) Where a court of appeals has rendered a decision in conflict with the decision of another

court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

* * *

APPENDIX B

Excerpts From Briefs in the consolidated cases below:

1. Excerpts From Brief for Respondent United States of America

Page 4

* * *

STATEMENT OF THE ISSUE

Whether the Federal Communications Commission properly weighed the values of diversity of viewpoint and economic competition in adopting a rule which substantially immunizes television stations from separation from commonly owned, co-located newspapers, based on diversity and competition.

* * *

Pages 18-19

* * *

The importance of not losing opportunities to increase diversity is particularly great in the case of newspaper-television cross-ownership. For, although the public interest goal is a multitude of independent sources of information, the economic and technological realities of contemporary life limit our ability to attain that goal.

The two most significant media sources of information for most people are television and daily newspapers. The great majority of Americans rely on them for news (App.). Supplemental Comments of the United States Department of Justice (1974), at p. 10. Other publications and radio exist, of course, but, as the Commission found, they do not measure up to television and daily newspapers as "a source for news or for being the medium turned to for discussion of matters of local concern".

* * *

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This scarcity of daily newspapers and television stations in metropolitan areas means that there are very few major sources of information, even when there is no cross-ownership in the market. * * * To put the matter another way, a general separation of newspaper-television combinations would increase the number of independent television stations and newspapers by at least twenty percent in 68 of 74 cities and 55 of 74 SMSAs.

* * *

Pages 23-24

* * *

Daily newspapers and television stations, the dominant forces in local media advertising, are so scarce that the separation of the combinations would increase the number of newspapers and television stations by at least 20 percent in 68 of 74 cities and 55 of 74 SMSAs.

* * *

2. Excerpts From Brief for Petitioner National Citizens Committee for Broadcasting

Pages 2-3

* * *

STATEMENT OF THE CASE

Introduction

On January 31, 1975, there were approximately 79 communities in the United States where a daily newspaper and a television station were jointly owned. On that date, the Federal Communications Commission, while finding creation of any new newspaper-TV combinations contrary to the public interest, refused to order divestiture of any such combinations except in seven small markets where

one party controlled the only television station and the only newspaper.[1]

The Commission also "grandfathered" existing newspaper-TV combinations in the other 72 larger markets, adopting a new, higher burden of pleading an issue of undue concentration of media control in license renewal challenges. Community groups complaining of concentrated ownership of their local media in renewal proceedings were thereby effectively denied a hearing.

* * *

[1]These were Anniston, Ala., Alabany, Ga., Mason City, Io., Meridian, Miss., Watertown, N.Y., Texarkana, Texas and Bluefield, W. Va. Similar actions were taken as to radio-newspaper combinations, affecting only nine small communities.

* * *

Page 21

* * *

1975 Second Report and Order

Finally, in January, 1975, the Commission issued its *Second Report and Order*, (A. 47) which failed to adopt the proposed rule requiring significant newspaper-television divestiture.

* * *

Page 22

* * *

a. *Divestiture*

The Commission, however, did not find in 1975 that maximum diversity included divestiture of major market television stations. It held that only prospective creation or transfer of newspaper-television combinations in those markets would be barred, and ordered divestiture solely of "egregious" (small-market absolute monopoly) combinations:

It is plain that what we are doing is grandfathering present newspaper-television owner combinations; we are only requiring divestiture in egregious cases . . . These divestitures are to take place over a five-year period and in order to avoid any possible future harm, we shall entertain waiver petitions. (¶ 16.) (A. 55).

* * *

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* * *

In some cases divestiture might result in reducing local ownership or integration of management and ownership. But in other instances (where the TV station is owned by a newspaper chain or where there is little or no integration), the local ownership/integration situation might be improved by divestiture.

* * *

Appendix A

Newspaper-Television Cross-Ownership

Maps and Tables

1. Areas of Dominant Influence in the United States in Which A Daily Newspaper and a Television Station Are Community Owned
2. Standard Metropolitan Statistical Areas In the United States In Which A Daily Newspaper and A Television Station Are Community Owned
3. Concentration Indices For Newspaper-Television Combinations Using Nine Different Weighings

* * *

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1624

ILLINOIS BROADCASTING COMPANY, INC.,

and

LINDSAY-SCHAUB NEWSPAPERS, INC.,

Petitioners,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*,

Respondents.

PETITIONERS' REPLY BRIEF TO RESPONDENT NCCB'S OPPOSITION

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IN THE

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NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*,

Respondents.

PETITIONERS' REPLY BRIEF TO RESPONDENT NCCB'S OPPOSITION

Respondent National Citizens Committee for Broadcasting (NCCB) filed a single brief, opposing the petition for *certiorari* sought in this case (76-1624) by petitioners Illinois Broadcasting Company, Inc. and Lindsay-Schaub Newspapers, Inc., and the petitions in No. 76-1471 *(FCC v. NCCB, et al.)*, No. 76-1521 *(Channel Two Television Company, et al. v. NCCB, et al.)*, No. 76-1595 *(National Association of Broadcasters, v. NCCB, et al.)*, No. 76-1604 *(American Newspaper Publishers Association v. NCCB, et al.)*, and No. 76-1685 *(The Post Company, et al. v. NCCB, et al.)*.

The NCCB opposition brief glosses the arguments of the several petitioners. With respect to the petition in this case (76-1624), the NCCB brief does not address, much less controvert the petitioners' strong showing of the necessity for this Court to grant the writ. In particular, the NCCB brief does not even consider the proposition that the decision and opinion of the Court of Appeals went beyond even NCCB's arguments below in directing the Federal Communications Commission to adopt the Court's presumption against the co-ownership of newspaper/radio stations irrespective of the number of other broadcast or print media which may be present in the radio/newspaper community. (Petition, pp. 10-13). NCCB now urges that the Court of Appeals was correct in reversing the non-divestiture FCC's determinations (NCCB Brief, page 13), but seeks to avoid the Supreme Court's review of that reversal by arguing that some further proceedings would be required to implement divestiture (NCCB Brief at p. 14).

The NCCB takes the position, erroneously we submit, that the Court of Appeals simply remanded the proceedings to the Commission and that review by this Court is not now warranted since, under the remand provisions, some further FCC proceeding would be required (NCCB Opposition Brief pp. 14, 16). But this proposition wholly misconstrues both the status and the effect of the Court of Appeals' direction to the FCC. For example, the Court of Appeals directed the FCC to be bound (in any further proceedings) by "a presumption against cross-ownership" and that in such further proceedings there must be a premise of "giving diversity of media ownership controlling weight". (Opinion below, printed at FCC App. in No. 76-1471 at 56-57, 167). Thus, while there may be another order or further proceedings by the FCC if the case is remanded to it without review by this Court,

the portions of the lower court's opinion which affect the instant petitioners, will have been decided.

The NCCB argument that since there would be some further, implementing procedures in the FCC to accomplish the divestiture directed by the Court of Appeals, the lower Court's judgment should not be reviewed now, does not take into account the provisions of 28 U.S.C. §2350,[1] or Rule 19 of this Court.[2] And certainly the Court of Appeals did not envision that its judgment was not final or ripe for review by this Court with respect to existing newspaper/broadcast ownership situations, in ordering, as the Court of Appeals said it had, "that everyone" (existing co-ownership as well as applicants for new facilities) "would be consistently treated under the standards. . ." of no co-ownership "adopted for new license applicants" (Court of Appeals Order of April 7, 1977, on FCC's Motion for Stay of Mandate).[3]

The Commission determined not to require divestiture in such cases as the petitioners';[4] the Court of Appeals directed the Commission to adopt rules looking toward divestiture. The basic constitutional and legal issues underlying such divestiture have been decided by the Court of Appeals, if they are not reviewed and revised by

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[1] Section 2350(a) ". . . and a final judgment of the Court of Appeals in a proceeding to review under this chapter are subject to review by the Supreme Court on a writ of certiorari as provided by Section 1254(1) of this title. * * *"

[2] A review of writ of certiorari may be granted, *inter alia*, where the Court of Appeals "has decided an important question of federal law which has not been, but should be, settled by this Court; * * *".

[3] Order printed in appendix to FCC's Reply Comments filed Aug. 5, 1977 in No. 76-1471.

[4] Co-ownership of WSOY AM/FM and a daily newspaper in Decatur, Illinois.

this Court. There is no reason to postpone this Court's review for such implementing divestiture orders which would ensue if the directions of the Court of Appeals to the FCC are not changed.

As shown in our opening brief, and not diminished by the NCCB opposition, there are serious and wide ranging constitutional, legal and broadcast/newspaper industry disruptures threatened by the Court of Appeals, which ought to be settled prior to any further action by the FCC. Hence, the NCCB opposition does not gainsay the importance, and the need now, for a grant of the Petition for Certiorari.

Respectfully submitted,

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August 12, 1977

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

Nos. 76-1471, 76-1521, 76-1595, 76-1604, 76-1624, and 76-1685

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner,*

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*

CHANNEL TWO TELEVISION COMPANY, *et al., Petitioners,*

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*

NATIONAL ASSOCIATION OF BROADCASTERS, *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*

AMERICAN NEWSPAPER PUBLICATIONS ASSOCIATION, *Petitioner,*

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*

ILLINOIS BROADCASTING CO., INC., *et al., Petitioners,*

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*

POST COMPANY, *et al., Petitioners,*

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR ILLINOIS BROADCASTING CO., INC. AND LINDSAY-SCHAUB NEWSPAPER, INC. PETITIONERS IN NO. 76-1624

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

Nos. 76-1471, 76-1521, 76-1595, 76-1604, 76-1624, and 76-1685

No. 76-1471

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*

No. 76-1521

CHANNEL TWO TELEVISION COMPANY, *et al.*, *Petitioners*,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*

No. 76-1595

NATIONAL ASSOCIATION OF BROADCASTERS, *Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*

No. 76-1604

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, *Petitioner*,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*

No. 76-1624

ILLINOIS BROADCASTING CO., INC., *et al.*, *Petitioners*,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*

No. 76-1685

POST COMPANY, *et al.*, *Petitioners*,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR ILLINOIS BROADCASTING CO., INC. AND LINDSAY-SCHAUB NEWSPAPERS, INC. PETITIONERS IN NO. 76-1624

OPINIONS BELOW

The opinion of the District of Columbia Circuit Court of Appeals is reported at 555 F.2d 938. It is printed in the Appendix (A. 339-431). The *per curiam* opinion of the court of appeals (as amended, see A. 26) which accompanied its order granting a partial stay of mandate on April 5, 1977, is reported at 555 F.2d 967, and is also printed in the Appendix (A. 435-444). The *Second Report and Order* of the Federal Communications Commission is reported at 50 F.C.C. 2d 1046 (1975) and its *Memorandum Opinion and Order* denying petitions for reconsideration at 53 F.C.C. 2d 589 (1975). They are printed in the Appendix (A. 134-316 and A. 317-338, respectively).

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1977 (A. 432-434). On April 5, 1977 the court of appeals filed its opinion and order, *supra*, on the motion of the Federal Communications Commission for stay of mandate, partially staying the mandate (A. 435-444).

The Petition for Writ of Certiorari in No. 76-1471 was filed on April 22, 1977; in No. 76-1521 on May 2, 1977; in No. 76-1595 on May 13, 1977; in No. 76-1604 on May 16, 1977; in No. 76-1624 (the within petitioners') on May 20, 1977; and in No. 76-1685 on May 27, 1977. The Petitions for Writ of Certiorari were granted October 3, 1977 (____ U.S. ____).

The jurisdiction of this Court in each case is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Federal Communications Commission adopted rules concerning co-ownership of AM, FM or TV broadcast stations and a daily newspaper in the same community. The rules barred the future establishment of such joint newspaper-broadcast ownerships, but ordered divestiture of only a few existing combinations (where the same party owned or controlled the only daily newspaper and only television station or, if no local television station, the only radio station). Upon review of the Commission action, the Court of Appeals for the District of Columbia Circuit reversed and remanded the matter to the agency, and directed the Commission to achieve full scale divestiture. The questions presented are:

1. Whether a ban against common ownership of a daily newspaper and an existing broadcast station, even in a community in which there are other broadcast stations, separately owned, is required by the First Amendment to the Constitution and the Communications Act, as the court of appeals directed the agency to conclude.

2. Whether the court of appeals exceeded its proper role of review under Section 402(a) of the Communications Act of 1934, as amended, by substituting its judgment for that of the Commission in the agency rule making proceeding, in directing the Commission to adopt a broadcast licensing policy to break up all situations of common ownership of daily newspapers and broadcast stations in the same community, including radio (AM and FM) – newspaper situations which were marginally stated in the opinion which considered diversity factors only in connection with newspaper-television co-ownerships.

STATUTES AND REGULATIONS INVOLVED

1. The relevant provisions of the Communications Act of 1934, 48 Stat. 1064, as amended (47 U.S.C. 151 *et seq.*), Sections 303, 307(a), 309(a), and 402(a) (47 U.S.C. §§303, 307(a), 309(a) and 402(a)), are printed in the Appendix (A. 27-32).

2. The Commission regulations under review appear in identical text as §§73.35, 73.240 and 73.636 of the Commission's Rules and Regulations governing, respectively ownership of AM, FM and TV broadcast stations (47 C.F.R. §§73.35, 73.240, 73.636). The text of the rules is printed in the Appendix (A. 243-263).

STATEMENT

These cases involve the constitutional validity of the proposition announced by the court of appeals that the Federal Communications Commission is required to adopt rules barring common ownership in the same community of a daily newspaper and a broadcast station and to apply such rules retroactively to require the break up of previously approved, long established cross-ownership newspaper broadcast situations, even where there are other broadcast stations in the city of the commonly owned newspaper/broadcast station.[1]

1. The Administrative Background.

The broadcast/newspaper ownership rules which are in issue here, had their inception in an FCC rule making

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[1] The Commission had "grandfathered" most existing newspaper-broadcast situations until voluntary sales, for example, when the new rules would come into play and preclude continuation of, or establishment of, a new broadcast-newspaper co-ownership.

proceeding which commenced in 1968.[2] Then the Commission proposed to adopt rules looking toward a prohibition against the establishment of commonly owned TV, AM and FM stations in the same market. Prospective bars only were signalled; forced divestiture of the many existing TV, AM and/or FM common ownerships was not then proposed. After two years of consideration, that phase of the proceeding was concluded with the adoption of rules, applicable on a prospective basis only and limited to co-ownership of a VHF television station and either an AM or FM station in the same city, barring such new combinations. AM-FM common ownerships were not proscribed. Television stations in the UHF ban combined with either or both AM and FM stations in the same city were to be considered separately, as such new applications might arise.[3]

With that, and simultaneously, the Commission issued a Further Notice of Rule Making to consider whether the prospective VHF TV-radio combination bar should be applied retroactively to require the break up of existing combinations and whether common ownership of a daily newspaper and a broadcast station in the same community should be proscribed.[4] This second

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[2] *Multiple Ownership of Standard, FM and Television Broadcast Stations*, Notice of Proposed Rule Making, 33 F. Reg. 5315 (1968), summarized in First Report and Order, Footnote 3, *infra*, at A. 33-36.

[3] *Multiple Ownership of Standard, FM and Television Broadcast Stations*, First Report and Order, 22 FCC 2d 306 (1970). (A. 33-100).

[4] *Multiple Ownership of Standard, FM and Television Broadcast Stations*, Further Notice of Proposed Rule Making, 22 FCC 2d 339 (1970). (A. 101-126).

stage commenced in 1970, and the administrative proceeding spanned five years. A substantial record was developed, with broadcast-newspaper owners,[5] industry associations and such groups as respondent NCCB actively participating.

On January 31, 1975 the Commission concluded its rule making proceeding with a report and order,[6] adopting the prospective broadcast/newspaper ownership rules and ordering the limited number of divestitures above referred to. No divestitures of combination broadcast ownerships (TV, AM or FM, however combined without newspapers) was ordered. The Commission found that there were significant public interest reasons for "grandfathering" most of the existing newspaper-broadcast ownerships (which it acknowledged it had encouraged in establishment), although changed circumstances did warrant a different

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[5] For example, petitioner Illinois Broadcasting Co., Inc. is a long time operator of stations WSOY and WSOY-FM in Decatur, Illinois. Various stockholders of the broadcast company own directly and indirectly the stock of petitioner Lindsay-Schaub Newspapers, Inc., the publisher of daily newspapers in Decatur (*Herald and Review*). In the FCC rule making proceeding it was shown that when Illinois Broadcasting acquired its AM station it was of low power and sharing time with a Bloomington, Illinois station. The station was in financial distress. The station employed only two technicians and was without any news department when acquired. Petitioner Illinois Broadcasting showed improvements in the station's technical facilities, frequency utilization and the establishment of a radio news department under a full-time news editor with journalism experience.

[6] *Multiple Ownership of Standard, FM and Television Broadcast Stations*, Second Report and Order, 50 FCC 2d 1046 (1975), reconsideration denied, 53 FCC 2d 589 (1975). Printed in full at A. 134-316 and A. 317-338.

policy for the future, and thus the rules to preclude the establishment of new broadcast/newspaper combinations.[7]

2. The Appellate Review.

Appellate review of the Commission's newspaper-broadcast rules[8] was sought by a number of parties, pursuant to Section 402(a) of the Communications Act (47 U.S.C. §402(a)), with intervenors on the various petitioners' sides. Those seeking review were, broadly, in three groups. In the first group were those subject to divestiture in the so-called media monopoly market situations. Then came various broadcast and newspaper owners, the newspaper publishers' association (ANPA) and the radio-television trade association (NAB), who addressed both the limited divestiture requirement and the prospective ban anent new newspaper-broadcast combinations. The third group is the lead respondent in this Court, the self-styled National Citizens Committee for Broadcasting and other ad hoc committees, which challenged the Commission's order as insufficient in not requiring an across-the-board divestiture. They focused, however, only on television-newspaper combinations.

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[7]The within petitioners do not concede that divestiture should be approved in any situation simply on the grounds that the broadcast station is owned by a newspaper or vise versa; however, the direction of the court of appeals to the Commission which affects the petitioners are those portions which would require a break up of radio and newspaper ownership even in such markets as Decatur, Illinois where there are other separately owned media outlets, accordingly, the emphasis of petitioners' brief is on the errors in that aspect of the lower court's decision.

[8]The "no break up" of existing TV-AM/FM situations was not challenged.

The Department of Justice, as a statutory respondent below, urged the appellate court to affirm those portions of the Commission's newspaper/broadcast rules which prohibited the creation of new common ownership situations, but asked that the portions of the rules with respect to the existing cross-interest situations be vacated and remanded for further agency consideration. Here, too, the arguments were made in context of television-newspaper situations and not radio-newspaper co-ownerships.[9]

The court of appeals affirmed the Commission's prospective cross-ownership ban. It opined that the legislative type policy judgment to be implemented by the new rules was supportable by the high place in the public interest quotient of the Communications Act occupied by the diversity of viewpoints proposition[10] and not constitutionally interdicted by the First Amendment. It pointed to judicial approval of earlier FCC rules limiting broadcast license holdings (*United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956)). From there the appellate court vaulted to a proposition that the public interest standard of the Communications Act and the implications of the First Amendment required the Commission to adopt a policy of giving diversity of media ownership controlling weight in licensing broadcast stations. The lower court held that the Commission erred because, having attempted to promote diversity through the prospective ban against

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[9]See excerpts from both NCCB's and the Department of Justice's briefs printed in the Appendix to the Petition for Writ of Certiorari in No. 76-1624, as Appendix B at pp. 5a-8a.

[10]Citing and quoting from, for example, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

the creation of new newspaper-broadcast co-ownerships in the same market, it failed to go further and order full scale divestiture under what the court said was a Communications Act and First Amendment "presumption against cross ownership" (A. 426, 431)[11]

The court disparaged each of the policies and values which the agency had found, on the basis of the record in the rule making proceeding and its experience administering the Communications Act, countervailed an across-the-board divestiture. Local ownership was dismissed as "of little concern to the Commission" (A. 420), or, in the court's view, a factor which it would not suppose would be reduced by breaking up local newspaper-broadcast cross-ownership situations (A. 421). The loss of continuity of operation, was counted of little significance (A. 423). The Commission's findings that existing cross-ownership situations involving newspapers and television stations have produced superior programming were rejected, not on the basis of the findings being without support in the record, but rather because, as the Court said, "the Commission *did not stress* (emphasis supplied) this superiority in deciding to grandfather most stations" and "comparing amounts of programming types aired . . . would . . . seem to be a crude measure of the public interest". (A. 399). Only diversity of ownership should be considered, said the court; all the rest are "lesser policies" (A. 427). Thus, the across-the-board divestiture by co-located newspaper-broadcasting stations was required, the court told

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[11] With the possibility, perhaps, of a waiver of the break-up requirement in a given situation, but without the newspaper/broadcast station's financial or personal interests cognizable as a waiver factor (A. 424).

the Commission. And, although the court drew its case for the presumption against broadcast/newspaper ownership in terms of television and newspapers as major information and viewpoint outlets, by a marginal note it ordered the Commission to include AM and FM stations in the divestiture.[12]

The court of appeals also found that the Commission was arbitrary and capricious in distinguishing between the "egregious" mass media monopoly situations (where the FCC had ordered divestiture) and other communities where the newspaper-broadcast owners faced competition. In the court's view, it was irrational for the Commission to conclude that the existence of an effective monopoly could control, and rather, so "that everyone would be consistently treated" the Commission's limited divestitures were set aside and the agency was directed to adopt an across-the-board divestiture rule, subject to waiver only in exceptional circumstances (A. 443).

After the release of the court's opinion, the Commission moved to stay the mandate (see A. 25 and A. 438). The court stayed its mandate "only insofar as it applies to the Commission's grandfathering rules" (A. 444), on the understanding that the Commission would file for *certiorari*. In its *per curiam* opinion and order, the court of appeals reiterated that its "policy" in this diversity/divestiture field was that diversification of media ownership is of controlling weight and the

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[12] In addition to the newspaper-television regulations, 47 C.F.R. §73.636(c), which form the heart of this case, the Commission also promulgated similar regulations regarding newspaper-radio station combinations. * * * Our decision, therefore, will pertain equally to both sets of regulations." (A. 346-347, footnote 1).

Commission was required to follow that "court-approved policy" and adopt a rule providing for across-the-board divestiture (A. 442-443).

SUMMARY OF ARGUMENT

The Court of Appeals made two basic errors in directing the Commission to adopt rules which would require the break up of every co-located newspaper/broadcast combination without regard to the number of other media outlets which might be present in the affected community The errors are interwoven in the directions to the agency, but can be examined in two discrete parts. First, the lower court elevated the Commission's authority to consider diversity of viewpoints in assigning relatively scarce broadcast outlets from a permissible, judicially approved diversity policy to a required divestiture proposition mandated by the First Amendment and the Communications Act. The court of appeals opined that the *prospective* ban against a radio license being granted to an applicant with a newspaper in the city in which the station would be located, was a permissible licensing policy, and not a prior restraint on the broadcast applicant nor a bar against the newspaper's First Amendment expression rights. It then extended that view to the point of telling the Commission that it must break up long established, previously approved, and even encouraged situations of common ownership of a newspaper and a broadcast station. The error here lies in the court's reasoning that if the public interest standard of the Communications Act permits a consideration of the relative scarcity of frequencies to justify a numerical limitation on the number of stations one individual could control, *U.S. v. Storer Broadcasting*, 351 U.S. 192 (1956), then the

same authority requires a radio station to be taken away from a party who has a newspaper outlet, or vice versa, in the same city. What may be permissible, must be required in the name of diversity, the court opined, although it did note there may be some limits since "[t]he *Red Lion* Court[13] carefully withheld approval from rules that would more directly interfere with the broadcasters' First Amendment rights. . . ." (A. 371-372).

Then, having created a presumption against broadcast-newspaper ownership, (to justify the limited divestiture cases ordered by the FCC), the court ordered the agency to apply the presumption across-the-board, thus dictating divestiture in every market. And here lies the second area of error. Rather than merely reversing the Commission and remanding the matter, the lower court's opinion leaves the FCC little doubt that it must adopt the court's "presumption" against any cross interest. The court's opinion forecloses the Commission from weighing, in such situations, other public interest licensing factors, including the all important one of service to the public. The lower court did not merely correct errors of law (assuming, *arguendo*, there were any); it commanded adoption of its own views, contrary to *U.S. v. Saskatchewan Minerals*, 385 U.S. 94 (1966) and *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17, 20 (1952).

Instead of invalidating the FCC's "grandfather" provisions on the basis of a newly found presumption against newspapers owning radio stations, or vice versa,

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[13] *Red Lion Broadcasting Co.*, footnote 8, *supra*, 395 U.S. at 367.

the court below should have allowed the rule to operate. In remanding the matter to the Commission, it should have permitted the agency to fill out interstices, if any. "... [T]he construction of a statute by those changed with its execution should be followed unless there are compelling indications that it is wrong". *Red Lion, supra* (395 U.S. at 381).

ARGUMENT

I.

THE LOWER COURT ERRONEOUSLY TRANSLATED THE IMPORTANCE OF DIVERSITY OF VIEWPOINTS UNDER THE FIRST AMENDMENT AND THE COMMUNICATIONS ACT TO A CONSTITUTIONAL AND STATUTORY BAN AGAINST NEWSPAPER AND BROADCAST CROSS-OWNERSHIP INTERESTS.

An important objective of the First Amendment to the Constitution is that of preserving "an uninhibited market place of ideas in which truth will ultimately prevail ...", *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969). The Communication Act's standard of "public interest, convenience or necessity"[14] permits the promulgation of reasonable rules by the Commission limiting the number of broadcast stations which may be held by a single entity or group related through cross-ownership of broadcast stations. *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1955). The

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[14] §§303, 307(a), 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§303, 307(a), 309(a) make it constitutionally permissible for the Commission to allocate broadcast channels so as to " 'render the best practical service to the community reached' " (*National Broadcasting Co. v. U.S.*, 319 U.S. 190, 212, 213 (1943), quoting from *F.C.C. v. Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1949).

general principal derived from these propositions was assigned a high place in the Commission rule making proceedings which resulted in a new rule banning the establishment, in the future, of broadcast stations by newspapers, or the acquisition of a newspaper in its city of license by a broadcast station.[15] But the court of appeals elevated these considerations which might authorize the Commission to limit licensing of broadcast facilities to newspapers in the future to a presumption against the continuation of all such ownerships in the same community. In effect the court of appeals concluded that what the Constitution may permit, it expressly commands; what the Communications Act may authorize the Commission to do, it directs the Commission to do. And there lies the court's error.

Unlike other media of expression, broadcasting is "inherently not available to all", *National Broadcasting Co. v. United States*, 319 U.S. 190, 226 (1943). Because of this characteristic, broadcasters have long been subjected to governmental regulations in the public interest. They are required to present opposing views on public issues under the so-called Fairness Doctrine.[16] *Red Lion Broadcasting, supra.* With this

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[15]The rules against granting a license to a party with same city daily newspaper interests are in terms of the ownership composition of the license applicant. The rules bar a newspaper from acquiring a broadcast station. However, if a broadcast station acquires a newspaper during a license term (three years), the newspaper ownership would disqualify it from the renewed grant of the license, so the ban works both ways.

[16]"... to afford reasonable opportunity for the discussion of conflicting views on issues of public importance". Section 315(a)(4) of the Communications Act, 1959 amendment, 73 Stat. 557.

safeguard, the service rendered by a station continues to be the ultimate test of "public interest",[17] and not the broadcast/paper ownership interests, particularly on this record where the Commission concluded against wholesale divestiture of existing situations of co-ownership.

The most important element of any licensing policy of the FCC under the Communications Act, namely the service which is rendered by a station, would be written out of consideration by the court. "With everybody on the air", wrote Mr. Justice Frankfurter for this Court thirty four years ago, "nobody could be heard". * * * [T]he radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interferring with one another. Regulation of radio was therefore . . . vital to its development. . . ." *National Broadcasting Co. v. U.S.*, 319 U.S. 190, 212-213 (1943). And, with the interference and scarcity factors, this Court did not restrict the Commission to the role of a "traffic officer policing the wavelengths to prevent stations from interferring with each other" (319 U.S. at 215), but held that it was constitutionally permissible to allocate channels to " 'render the best practical service to the community reached' " (quoting from *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1949)). And see *Red Lion Broadcasting Co.*

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[17] See, for example, *NAACP v. Federal Power Commission*, 425 U.S. 662, 670 (1976), where (n. 7) this Court referred to the FCC's regulations concerning employment discrimination by broadcasters, and noted their justification insofar as they are "necessary to enable the FCC to satisfy its obligation under the Communications Act . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups".

v. F.C.C., 395 U.S. 367, 394 (1969). But the court of appeals would apply those cases to require the suppression of newspaper ownership by a broadcast station owner in a market with many otherwise-owned radio and TV stations (and often other newspapers, too).

Whatever might be said about a licensing policy under the Communications Act which includes a factor of determining the effect *vel non* on the whole public interest quotient of an applicant's other media interests, it is quite another thing to say, as the court of appeals would do, that the FCC must interpret the Communications Act to require a radio station to dispose of a newspaper in its community of license, or lose its broadcast license. In another light, the requirement for divestiture would be laid upon the newspaper and it could continue its free speech right of publication only upon the condition of getting rid of its radio station. In either vein, the co-located newspaper/broadcast station owner's First Amendment rights would be infringed within the depth of such Constitutional protection outlined by this Court in *Miami Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

Although the court below noted that "[t]he *Red Lion* Court carefully withheld approval from rules that would more directly interfere with the broadcasters' First Amendment rights . . ." (A. 371-372), it misconstrued and misapplied this Court's decision in *Red Lion* to require divestiture, even in multi-media access communities and without regard to the service provided by the station[s]. This was contrary to this Court's statement in *NBC, supra*, that "[s]ince the very inception of federal regulation by [sic] radio, com-

parative considerations as to the service to be rendered have governed the application of the standards of 'public interest, convenience, or necessity' " (319 U.S. at 217).

The nub of the lower court's decision which necessitates revision by this court, is the holding that the First Amendment objectives of preserving "an uninhibited market place of ideas in which truth will ultimately prevail . . .", *Red Lion Broadcasting Co. v. FCC, supra,* and the standard of "public interest, convenience or necessity" of the Communications Act require the FCC to accomplish across-the-board divestiture, simply because it may, in allocating broadcast facilities, take diversity of ownership into account. It is submitted that tne lower court's newly found presumption should be struck down.

II.

THE COURT OF APPEALS SUBSTITUTED ITS OWN VIEWS FOR THE COMMISSION'S JUDGMENT IN A POLICY AREA, DEPARTING FROM THE PROPER ROLE OF AN APPELLATE COURT IN REVIEWING AGENCY RULEMAKING.

The lower court held that the *prospective* ban against a radio license to an applicant with a newspaper in the city in which the station would be located was a permissible licensing policy of the Commission. It concluded that such action was not a prior restraint on the broadcast applicant nor a bar against the newspaper's First Amendment expression rights. But then it extended that view to require the Commission to force the break-up of existing, long-approved newspaper-broadcast combinations. The court thus exceeded the boundaries of appropriate judicial review in agency rule

making proceedings. The Commission had balanced the various factors in the "public interest" standard of the Communications Act and fairness to the broadcasters in permitting "grandfathering". The Commission had also weighed all the policy factors lying between no ban against newspaper ownership at all to a prospective ban; from permitting the continuation of the long-established co-ownership situations (except in the "egregious" situations of no effective competition) to an across-the-board divestiture. The court, however, supplanted the Commission's fine balancing, and ordered a complete ban, with divestiture. This, in our view, was contrary to the permissible judicial review role in such case. *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80 (1943), *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 202 (1947).

Constitutional and statutory considerations underlying the court's newly found presumption against broadcast ownership aside, rather than merely reversing the Commission and remanding the matter,[18] the opinion leaves the agency little doubt that it must adopt the court's presumption without any weighing of other public interest licensing factors. The lower court did not merely correct errors of law (assuming, *arguendo*, there were any), it commanded adoption of its own views, contrary to this Court's teachings in such cases as *U.S. v. Saskatchewan Minerals*, 385 U.S. 94 (1966) and *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17, 20 (1952).[19]

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[18] See 5 U.S.C. §706(2)(a).

[19] Citing, *e.g.*, *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).

The petitioners recognize that upon a review in a case such as this, the court of appeals may correct errors of law and on remand the Commission would be bound to act upon the correction. *FCC v. Pottsville Boradcasting Co.*, 309 U.S. 134, 140 (1940). However, this principle does not permit the court "as an indirect result of its power to scrutinize legal errors" (*Ibid.*) to direct the Commission as to the determinative role to be assigned to diversity of ownership in assaying existing broadcast services in such communities as those represented by the petitioners here, where there are other, separately owned broadcast and CATV outlets.

The petitioners, with cross-ownership interests in the newspaper in Decatur, Illinois and radio stations WSOY and WSOY-FM, have operated the broadcast stations for almost four decades. The stations' records have been reviewed tri-annually by the Commission, when the licenses have been submitted for renewal. No showing of any mis-use of the cross ownership of the Decatur daily newspaper was ever developed in those proceedings, nor on the record in this rulemaking proceeding before the FCC. On the other hand, the journalism experience of Lindsay-Schaub and its news gathering facilities brought an increase in the news and public affairs aspect of the broadcast stations' programming. All of this, and the 160 other situations of radio-newspaper cross-ownership established under Commission aegis and encouragement, was evaluated by the Commission, and the "grandfathering" provisions were fashioned in the rule making proceeding. For the court of appeals to say that against all this the Commission should adopt the rule that would give controlling weight (A. 431) to diversifying media outlet ownership in the remand proceedings, would foreclose the

Commission from any consideration of other public interest licensing factors, such as the all important one of service to the community.[20]

The lower court sustained the Commission's prospective ban, and approved the principle underlying the FCC's limited divestiture order, and then used those approvals to find the Commission's determination not to require across-the-board divestiture as arbitrary and capricious (A. 418, 440, 443). But this use of the Commission's public interest conclusions in the rule making proceeding as to the future cannot save the error of the lower court's holding that those conclusions require divestiture as a matter of law.

The lower court's afterthought as to the extent of its direction to the Commission about divestiture, saying it ordered the result on remand only so "that everyone" (existing co-ownership as well as applicants for new facilities) "would be consistently treated under the standards . . ." of no co-ownership "adopted for new license applicants",[21] does not obscure the error of directing a result and determining what rule the Commission should adopt on remand. The difference between a new applicant and a long established, Commission-encouraged "grandfather" situation, when supported by the record as it was here, is an administrative function of the agency. The court's direction to the contrary invaded the administrative

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[20] To implement the constitutionally permissible allocation tool of considering frequency assignments so as to " 'render the best practical service to the community reached' ", *National Broadcasting Co. v. U.S., supra.*

[21] Contained in its per curiam opinion ordering the partial stay of mandate (A. 443).

function. *Federal Power Commission v. Idaho Power Co., supra,* 344 U.S. at 20.

Prospective-only application of a Commission regulation, particularly in the field of regulations concerning broadcast ownership, is neither unknown nor "arbitrary and capricious" when unaccompanied by divestiture requirements. For example, in *United States v. Storer Broadcasting Co., supra,* the limitation on the number of broadcast stations was upheld, and no divestiture requirements were imposed by this Court on the Commission in implementing the new regulations.[22]

In this case, the court of appeals purported to assay the record before the Commission as insufficient to support the agency's "grandfathering" provisions, but only in terms of television and newspaper, while directing the Commission to include radio (AM and FM) broadcast stations in the across-the-board divestiture orders which should follow on remand. (See footnote 1 of the Court's opinion, A. 346-347). From what has been said before, it is apparent that the within petitioners believe that the reasoning and eventuating judgment of the court of appeals should be set aside because of the basic errors which affect it, applicable to all classes of broadcast stations. The reference to portions of the court's opinion which encompasses AM and FM stations in a direction to the agency in which only television stations (vis-a-vis newspapers) have been

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[22]Even in the present case, the FCC's broadcast-newspaper ownership rule commenced upon a premise of no divestiture in the TV-other broadcast, same-city ownership rule changes, which was not challenged below.

considered simply highlights, rather than distinguishes, the errors on the basis of applicability to AM or FM, on the one hand, and television on the other. The court's result is inconsistent with the approach the Commission has followed for many years in its broadcast ownership rules to take into account differences between and among AM and FM stations and television stations, and even between television stations on a VHF and UHF basis.[23]

Finally, the provisions in the lower court's opinion that waiver procedures relative to divestiture would (have to) be incorporated by the Commission, hardly saves the direction for divestiture from invalidity. With a bow to this Court's *Storer* decision[24] that a bar is not absolute, and hence not fatal, if the Commission rules furnish an opportunity for waivers or exceptions, even in this area the lower court erred by directing a limited scope of any waiver consideration. The lower court's direction to the FCC is ambiguous at best. At one point the court marginally noted that "if it appeared likely that a newspaper would fail as a result of divestiture, the Commission could reasonably conclude that the public interest called for a waiver" (A. 426, footnote 104, citing *International Shoe Co. v. FTC*, 280 U.S. 291, 302-303 (1930). Elsewhere,

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[23]Such as the ownership rules approved by this Court in *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), which on remand to the District of Columbia Circuit, saw the numerical limits established by the Commission sustained on the grounds that they were based on the Commission's experience "coupled with a design to avoid undue disruption of existing service". *Storer Broadcasting Co. v. U.S.*, 240 F.2d 55, 56 (1956).

[24]*United States v. Storer Broadcasting*, 351 U.S. 192, *supra*.

however, it sternly stated that "the demise of marginally profitable newspapers contrary to the intent of the Newspaper Preservation Act[25] are little more than speculations" and not cognizable to defend against the court's desired across-the-board divestiture (A. 410), and "[p]rivate losses are a relevant concern under the Communications Act only when shown to have an adverse affect on the provisions of broadcasting service to the public". (A. 424).

In sum, the court of appeals has attempted to substitute its judgment for that of the Commission as to the relevant weight to be accorded diversity of ownership and other licensing policies in making the public interest judgments required of the Commission under the Communications Act. The errors in the court's opinion in going beyond the proper role of a reviewing court under Section 402(a) of the Communications Act, present the same need for reversal by this Court as in *Pottsville, supra,* and *Federal Power Commission v. Idaho Power Co., supra.*

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[25]P.L. 91-353, 84 Stat. 466 (1970).

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

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